LIBRARY
SUPREME COURT U.S.

Supreme Court, U.S.
FILED
JUN 11 1963
JOHN F. DAVIS, CLERK

No. 657

Supreme Court of the United States

October Term, 1962

INDEX

	Page
Statement	1
Argument	3
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Benton v. *United States*, 114 F. Supp. 37	4
Central Freight Lines, Inc.—Control—Alamo Express, Inc., 70 M.C.C. 610, 75 M.C.C. 731	2, 3, 5, 6, 7
Central Freight Lines, Inc., Note, 90 M.C.C. 246	2, 3–4, 6, 8
Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492	5
Jersey City v. *United States*, 101 F. Supp. 702	4
Moffat Tunnel League v. *United States*, 289 U.S. 113	4
Moog Industries, Inc. v. *Federal Trade Commission*, 355 U.S. 411	5
Pittsburgh & W. Va. Ry. v. *United States*, 281 U.S. 479	4
St. Joe Paper Co. v. *Atlantic Coast Line R. Co.*, 347 U.S. 298	5
Texas & New Orleans R. Co., v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151	4
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33	5
Walker v. *United States*, 204 F. Supp. 918	6, 7
Watson Bros. Transportation Co. v. *Jaffa*, 143 F. 2d 340	4
Statute:	
Interstate Commerce Act, 49 U.S.C. 1, *et seq.*:	
Section 5	2, 4, 6, 8, 9
Section 214	6, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 657

J. L. WALKER, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

In June 1956 Central Freight Lines, Inc., entered into contracts with J. L. Walker, the appellant, and Louis E. Hart to purchase all of the capital stock of Alamo Express, Inc., and two affiliated non-carriers (Alamo Cartage and W. & H. Investment Company). Appellant owns 52.6 percent of the stock of these corporations and Louis E. Hart the remaining 47.4 percent. Under the terms of the contracts, Central was to issue unsecured promissory notes of $900,000

to appellant and $600,000 to Hart, and make cash payments for a total purchase price of $2,000,000 (J.S. 4–5, 27).[1]

In July 1956 Central and W. W. Callan (Central's president and majority stockholder) applied to the Interstate Commerce Commission for approval of the transaction under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5 (Appendix, *infra*, p. 9). Initially, the Commission withheld approval of the transaction because it foresaw that the issuance by Central of the notes necessary to consummate the transaction would result in Central's overcapitalization. *Central Freight Lines, Inc.—Control—Alamo Express, Inc.*, 70 M.C.C. 610 (1957). Thereupon Central filed a petition for reconsideration in which it advanced proposals for meeting the overcapitalization problem. Following a number of further proceedings, the Commission, by orders of January 22, 1959 (75 M.C.C. 731), June 4, 1959 (J.S. 46), and February 19, 1962 (90 M.C.C. 246), "approved consummation of the 1956 contracts. It * * * clothed Central with full authority and financial means (through Callan) to comply fully with Central's obligations to Walker under the 1956 contracts" (J.S. 42).

The problem of overcapitalization was obviated by authorizing the following method of financing: Central may issue all the notes necessary to complete the purchase of the capital stock of the three companies—

[1] While the initial contracts required notes totalling $1,500,000, supplemental agreements between Hart, the minority stockholder, and the appellees Central and Callan obviated the need for $300,000 of these notes (90 M.C.C. 246, 247, note 2; J.S. 28, note 6).

Alamo Express, Alamo Cartage and W & H—from Walker in accordance with the exact terms of the 1956 contracts; but before issuance of the note necessary for the purchase of Walker's W & H stock, Central must receive payment of the full face value of the note in cash from Callan; and in exchange for this cash Callan may receive the W & H stock from Central (J.S. 34, 42; 90 M.C.C. at 247–249).

Appellant, a party to the 1956 purchase contracts, brought this action to set aside the Commission orders approving consummation of the contracts.

The three-judge district court expressed doubt as to the appellant's standing to bring this action (J.S. 37), but went on to dismiss the complaint on the merits (J.S. 26–43). Judge Rice dissented.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Appellant lacks standing to challenge the Commission's action. The Commission order of June 4, 1959 (J.S. 46), upon which appellant focuses his attack (J.S. 12–20), permitted Central to assign to Callan, its president, its contract right to purchase the W & H stock, rather than have Callan purchase the stock directly from appellant as authorized by a prior Commission order of January 22, 1959 (75 M.C.C. 731, 757). Appellant's basic contention is that the Commission is forcing upon him a contract to which he never assented.

Initially, appellant's contention has been rendered moot by the Commission's order of February 19, 1962

(90 M.C.C. 246), which eliminates his objections to the order of June 4, 1959. The February 19 order authorizes Central itself to purchase the W & H stock directly from Walker exactly as provided in the 1956 contracts. But even if the February 19 order had approved consummation of a transaction which varied from that set forth in the 1956 contracts, appellant would have no grounds for objection here. His contention misconceives the nature of the Commission's order which does not require appellant to dispose of his stock or obligate him in any manner to consummate any particular transaction. Nor, for that matter, does the order obligate Central or Callan to acquire any stock. Any obligation results from the contracts made by the parties. Whether or not the appellant must go through with his contracts is a matter of private contract law, which the parties must litigate in the courts and not before the Commission (J.S. 40). *Watson Bros. Transportation Co.* v. *Jaffa*, 143 F. 2d 340, 346 (C.A. 8); *Texas & New Orleans R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151 (C.A. 5). Since the Commission's order is merely permissive in nature, holding that consummation of the contracts would not violate Section 5 of the Interstate Commerce Act, the appellant is not aggrieved and therefore lacks standing to challenge the action. *Benton* v. *United States*, 114 F. Supp. 37, 43 (M.D. Ga.); and see *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479, 486; *Moffat Tunnel League* v. *United States*, 289 U.S. 113, 119–120; *Jersey City* v. *United States*, 101 F. Supp. 702 (D. N.J.).

2. In any event, appellant errs in his view of the merits. The appellees sought to cure the infirmity of the overcapitalization of Central by providing for an assignment of Central's rights and obligations under the contract to Callan, with Central to act merely as a conduit to enable consummation of the transaction (J.S. 34–35, 46). Appellant argues that the Commission is without power to approve this proposal of Central and Callan because he never assented to it.[*] However, the Commission's orders do not vary any of appellant's rights and obligations under his contracts with Central. Walker is getting exactly what he bargained for in his contracts (J.S. 42).

Nor is *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, relevant. That was a case where

[*] Appellant also attacks the prior report and order of January 22, 1959 (75 M.C.C. 731), arguing that the Commission was not authorized to entertain any "modified transaction," which had not been consented to by appellant, and that the 1957 order withholding approval of the transaction because of the overcapitalization problem was the "final action" of the Commission (J.S. 49). This argument is similarly without merit, since the subsequent orders of the Commission did not affect any of the appellant's rights or obligations under his contract. Furthermore, appellant did not make this argument before the Commission, but on the contrary supported the validity of the January 22, 1959, order before the Commission. See appellant's "Reply and Brief to Petition for Reconsideration and Modification Filed February 26, 1959," filed with the Commission on March 13, 1959, pages 1–2; and "Petition for Reconsideration of the Order of the Commission of June 4, 1959," filed June 29, 1959, pages 12–13. Hence this argument is foreclosed to the appellant because it was not raised before the Commission. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37; *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501.

the Court held that the Commission did not have the power to propose and require consummation of a merger to which the carriers involved had not agreed. All the Commission's order does in this case is to *permit* the applicant (Central) to consummate a contract agreed to by the parties.

3. Appellant makes various procedural arguments which are similarly without merit.

The Commission's orders of January 22, 1959 (75 M.C.C. 731, 737), and June 4, 1959 (J.S. 46), approving the transaction, provided authority to Central to issue $750,000 of notes. This suit followed. The district court, noting that the 1956 contracts would require Central to issue notes totalling $1,200,000, at first remanded the proceedings "for clarification whether the approval of the § 5 application does or does not constitute appropriate authorization under § 214 for the issuance of the promissory notes to Walker (and Hart as appropriate) as called for in the initial contracts of June 30, 1956" (*Walker* v. *United States*, 204 F. Supp. 918, 921 (W.D. Tex.)).[3]

In the proceedings on the remand, the Commission entertained and approved a further application authorizing Central to issue to appellant, in addition to the $750,000 it had previously authorized, a note of $450,000. *Central Freight Lines, Inc., Note*, 90 M.C.C. 246.

Appellant contests the propriety of the Commission's entertaining Central's application to issue the

[3] See note 1, p. 2, *supra*.

[4] The pertinent provisions of Sections 5 and 214 of the Interstate Commerce Act are printed in the Appendix, *infra*, pp. 9–10.

additional note of $450,000 during the proceedings on remand (J.S. 20–23). But as the court below held, the Commission acted strictly in accordance with the scope of the mandate intended by the court. The remand order expressly anticipated "further proceedings" and "supplemental orders or reports." *Walker v. United States*, 204 F. Supp. at 921. The district court itself emphasized "the broad latitude we afforded the Commission in its reconsideration under our interim remand" (J.S. 29), and expressly stated "our [remand] order invested it [the Commission] with adequate authority to undertake such proceedings as in the Commission's judgment might be required" (J.S. 32–33). At any rate the appellant, who had alleged that the prior orders authorized consummation of a transaction to which he had not agreed, is in no way aggrieved by the proceedings which corrected this alleged infirmity.

Petitioner further contends that the Commission's order of June 4, 1959, which varied its order of January 22, 1959, is not supported by findings and conclusions to show why the Commission permitted Central to assign to Callan the right to purchase the W. & H stock, rather than have Callan purchase directly from appellant. This contention is without merit. The Commission's lengthy order of June 4, 1959, whether read alone or in conjunction with the report and order of January 22, 1959, which are expressly made a part thereof (J.S. 46), plainly shows that the Commission permitted the assignment by Central to Callan because this provided another

acceptable method of curing the infirmity of the overcapitalization of Central.[5]

CONCLUSION

For these reasons, the judgment should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
GERALD KADISH,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

LEONARD S. GOODMAN,
Attorney,
Interstate Commerce Commission.

JANUARY 1963.

---

[5] Contrary to appellant's contention (J.S. 23–24), the mere passage of time does not deprive the Commission of power under Sections 5 and 214, 49 U.S.C. 5, 314, to approve the transaction here involved. Nor is there any merit to appellant's contention that he was not given a hearing following the remand (J.S. 24) in view of the conclusion of the Commission (90 M.C.C. 246, 249), which the lower court upheld (J.S. 36), that appellant alleged no facts which were deemed to require an additional hearing and further delay.

APPENDIX

Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, provides in pertinent part as follows:

Sec. 5.

* * * * *

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *

Section 214 of the Interstate Commerce Act, 49 U.S.C. 314, provides as follows:

Sec. 214. Common or contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20a of part I of this Act (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the value of capital stock or principal amount of

other securities to be issued, together with the value of capital stock and principal amount of other securities then outstanding, does not exceed $1,000,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $200,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of capital stock having no par value, the value thereof for the purpose of this section shall be the fair market value as of the date of its issue; and in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is the greater * * *.